IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| CHARLES D. STEIN | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| FOAMEX INTERNATIONAL, INC., et al. | : | No. 00-2356 |

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.** **JULY 23, 2001**

Presently before the Court is a Motion to Compel Plaintiff's Production of Documents and a Motion In Limine to Preclude Plaintiff's Presentation of Evidence Related to Alleged Damage Categories Never Enumerated By Plaintiff, both of which were filed by the Defendants, Foamex International, Inc., Foamex L.P., Foamex Carpet Cushion, Inc., Trace International Holdings, Inc., General Felt Industries, Inc., GFI-Foamex and Marshall S. Cogan (collectively referred to as the "Defendants"). In this case, the Plaintiff, Charles D. Stein ("Stein"), filed suit against the Defendants, alleging, among other things, violations of several federal environmental statutes. The Defendants assert that, throughout discovery, Stein has not produced requested documents and has not sufficiently set forth the damages sought in his Complaint. They have therefore filed the instant Motions. The Court held extensive argument on these Motions and allowed the parties to present relevant evidence. For the following reasons, those Motions are granted in part and denied in part.

## I. DISCUSSION

### A. Defendants' Motion to Compel Plaintiff's Production of Documents and for Sanctions (Doc. No. 38)

#### 1. Background

Stein is the owner of a twenty-two acre industrial property located in Philadelphia. The Defendants or their predecessors had leased that property from Stein for forty years. As part of their operations, the Defendants installed several underground storage tanks on the property. Stein alleges that, at some time in 1996 while the Defendants were occupying his property, it became contaminated with environmental pollutants. Stein filed his Complaint against the Defendants, alleging, among other state law claims, violations of several federal environmental statutes. Stein seeks compensation for the damages allegedly caused to his property, as well as his investigative, remedial and legal fees.

On November 30, 2000, Stein submitted the Expert Report of Gary Brown ("Brown"), his only expert. On February 28, 2001, the day expert discovery was supposed to close, Defendants deposed Brown. During that deposition, the Defendants questioned Brown about his involvement in similar environmental cases. The Defendants specifically inquired about five of Brown's previous cases. The Defendants also inquired about a reference in a January 30, 2001 invoice, which indicated that Brown had prepared a memorandum for Stein on December 31, 2000. At the deposition,

the Defendants requested a copy of that memorandum. Counsel for the Defendants asserts that she also requested copies of documents relating to Brown's work as an expert on other, unrelated environmental cases.

On March 1, 2001, the Defendants sent a letter to Stein's counsel requesting production of the December 31, 2000 memorandum. Stein responded that Brown could not locate it and stated that it did not exist. On May 2, 2001, the Defendants sent another letter to Stein seeking production of the memorandum. This letter also explicitly sought discovery of any documents relating to Brown's involvement in previous environmental cases. Stein did not respond to that letter or make the requested production. The Defendants sent two additional letters to Stein and left one voice mail message at the office of Stein's counsel, each of which sought production of the aforementioned documents and informed Stein that, if he did not comply, they would have to file a motion to compel production. Stein failed to respond or object to the requested discovery in any way. On June 7, 2001, the Defendants filed this Motion to Compel Production.

After the Defendants filed this Motion, Stein produced most of the requested documents. Stein has not, however, produced the December 31, 2000 memorandum because he claims it does not

exist.[1] Moreover, Stein's production of certain documents relating to Brown's previous environmental cases appears incomplete; the Defendants allege that tables and figures are missing from documents supplied by Stein pertaining to Brown's involvement in prior cases. Stein also has failed to state unequivocally that he has produced all of Brown's prior testimony, depositions, and associated expert reports in similar environmental cases.[2]

---

[1] The Court takes no position on whether this memorandum does exist. The Court notes, however, that, during the hearing on this matter, Brown offered at least two conflicting explanations for his inability to produce it. First, he stated that someone had begun working on the memorandum on December 31 but later deleted it after it became unnecessary. Later, when confronted with the fact that December 31 fell on a Sunday in 2000, Brown conceded that no one worked on the memorandum that day, but suggested that the invoice reflected work done during the preceding week.

[2] Indeed, it appears that he has not produced all such documents. At the hearing on this matter, Brown admitted that he had neither mentioned nor produced many documents from at least one unrelated environmental case because they were "confidential." Tr. of Hr'g at 41-14. This position is interesting, given Brown's frequent refusal to answer non-technical questions because he is not a lawyer. Id. at 50-6. It is unclear exactly how many such documents or cases exist. To his credit, Stein's counsel did not argue that these documents are confidential. Although Brown stated that he had been advised that these documents were confidential, the Court will assume that the attorneys in the unrelated case, not the instant one, did so. In any event, in its Order resolving this Motion, the Court will order Stein to produce those documents as well.

2. Standard of Review

Pursuant to Federal Rule of Civil Procedure 26, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Moreover, Rule 26 requires parties to disclose a "listing of any other cases in which the witness [expert] has testified as an expert at trial or by deposition within the proceeding four years." Id. (a)(2)(B). Parties have a duty to supplement that disclosure. Id. (a)(2)(C), (e)(1). Failure to make these disclosures can subject parties to sanctions pursuant to Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(c)(1).

"The discovery rules are based on the assumption that voluntary compliance by the parties is to be expected." Transportes Aereos De Angola v. Ronair, Inc., 104 F.R.D. 482, 498 (D. Del. 1985). Under Rule 37, however, if a party served with a discovery request fails to respond or to answer completely, the discovering party may move for a court order compelling an answer. Fed. R. Civ. P. 37(a); Swope v. National Presto Indus., Inc., Civ. A. No. 89-2731, 1990 WL 149203, at *1 (E.D. Pa. October 3, 1990). Rule 37 states that:

> If the motion is granted or if the disclosure or requested discovery is provided after the motion

> was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the . . . attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees.

Fed. R. Civ. P. 37(a)(4)(A). Nevertheless, those sanctions are inappropriate if the movant failed to make a good faith effort to obtain the discovery or if the nondisclosure was substantially justified. Id. The decision to order a party to pay another's costs "is a matter entrusted to the sound discretion of the district court." Marcarelli v. Delaware County Memorial Hosp., Inc., Civ. A. No. 86-1630, 1987 WL 15213, at *2 (E.D. Pa. July 30, 1987).

3. Discussion

Because Stein's belated production has been incomplete, and because Stein has never argued that the requested documents are undiscoverable, the Court will order him to produce the remainder of the unproduced documents. The question therefore becomes whether Stein should pay to the Defendants' their reasonable costs incurred in making this Motion. The Court finds that he should.

Although Stein has produced the great majority of the requested documents, he did so only after the Defendants filed the instant Motion to Compel. Under the clear language of Rule

37, the Court can order Stein to pay the reasonable costs associated with the filing of that Motion, including attorney's fees. See Fed. R. Civ. P. 37(a)(4)(A). It is evident based on the record in this case that the Defendants made a good faith effort to secure the production of these documents before seeking judicial intervention in the discovery process. The record is equally clear that Stein was not substantially justified in waiting until after this Motion was filed to produce these documents. The Court afforded Stein ample opportunity to explain his failure to produce the requested documents. His explanations are unsatisfactory. Stein's argument that the Motion to Compel is insufficient under Local Rule of Civil Procedure 26.1(b) lacks any merit.[3] Although Stein argues that the Defendants cannot obtain fees for a motion to compel nonexistent documents, namely the December 31, 2000 memorandum, he ignores the myriad other documents, which do exist, that Stein did not produce until after the filing of this Motion to Compel. Nor does the fact that the Defendants' discovery requests were contained in letters, rather than formal requests for production of documents, excuse the nonproduction of the requested documents; Federal Rule of Civil

[3] E.D. Pa. R. Civ. P. 26.1(b) requires only that "[e]very motion [related to discovery] shall identify and set forth, verbatim, the relevant parts of the . . . request. . . ." The Defendants' Motion to Compel clearly sets out, verbatim, the requests that it served on Stein before filing this Motion, as they are in fact attached as exhibits to the Motion.

Procedure 34(b) requires only that "the request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity." Fed. R. Civ. P. 34(b).

Stein's only meritorious argument was that the discovery requests may have been filed after the close of discovery. This argument was never asserted until the hearing of this matter. Furthermore, the record does not clearly support Stein's argument; counsel for the Defendants asserted that she requested these documents after Stein's initial deposition, and counsel for Stein discussed only matters that occurred during the deposition. See Tr. of Hr'g at 163-21. Moreover, counsel for Stein could have made the filing of the instant Motion unnecessary by lodging that defense at an earlier time, rather than waiting for the Defendants to file their Motion. Accordingly, the Court will grant the Defendants' Motion to Compel and will order Stein to pay their reasonable expenses in filing the Motion.

B. Defendants' Motion to Preclude Plaintiff's Presentation of Evidence Related to Damage Categories Never Enumerated by Plaintiff (Doc. No. 30)

1. Background

Stein's Complaint alleges that he has incurred many types of damages. For example, Stein seeks recovery for his already

incurred legal, investigative and remedial fees, as well as a declaratory judgment stating that he is entitled to recover those fees in the future. The Defendants do not seek to preclude Stein from presenting evidence of these damages, as he has apparently enumerated them to the Defendants' satisfaction.

The Defendants do, however, object to the production of evidence relating to Stein's other alleged damages. Specifically, Stein also seeks recovery of damages in the following categories: (1) diminution of fair market rental or sale value of his property; (2) stigma damages; (3) loss of use; and (4) lost opportunity costs. In order to ascertain the value of these particular damages, the Defendants served several interrogatories and requests on Stein. Specifically, the Defendants' Interrogatory No. 14 asked Stein to "[s]et forth in detail the amount of any costs or damages you seek to recover from Defendants. . . ." Similarly, Defendants' Document Request No. 16 asked Stein to produce "[a]ll documents reflecting or referring to the costs or damages referred to in plaintiff's response to Interrogatory No. 14." In his October 31, 2000 response to the Defendants' Interrogatory No. 14, Stein indicated that, because his investigation of his own damages was ongoing, "his answer to this Interrogatory will be supplemented as his investigation progresses and more fully detailed in his experts' report." Stein produced documents detailing his legal and

investigative fees only.[4]

On January 12, 2001, the Defendants sent Stein a letter asking him to supplement his disclosures and responses to interrogatories to include information regarding the computation of his damages. Stein did not supplement his responses before the January 16 deposition of Stein. At that deposition, Stein stated that he would supplement his response to interrogatories and requests to include information relating to his damages.

When discovery closed, the Defendants were still occupying Stein's property. Pursuant to their lease agreement, the Defendants did not leave the property until April 13, 2001. Although the Defendants were entitled to remain on the property until the expiration of their lease, Stein believes this fact impaired his ability to properly conduct discovery.

On February 20, 2001, the Defendants sent a letter to Stein asking him to produce evidence relating to his calculation of damages. On February 27, at the second day of Stein's deposition, Stein did not produce any further documents. Counsel for Stein then asserted that they were seeking a declaratory judgment not only for Stein's future investigative and remedial

---

[4] Stein also produced a 1989 appraisal of his property. Even assuming the 1989 appraisal represented an accurate valuation of the property in an uncontaminated state, the appraisal would not reflect the loss in value of his property unless it were accompanied by a similar appraisal of the property after the alleged contamination. Stein did not produce such an appraisal.

fees, but also for the diminution in value of the property. Stein's Pretrial Memorandum did not enumerate his alleged damages other than listing his legal and investigative fees.

2. Standard of Review

Federal Rule of Civil Procedure 26 requires that parties must provide adverse parties with "a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered. . . ." Fed. R. Civ. P. 26(a)(1)(c); see also E.D. Pa. R. Civ. P. 16.1(c)(3) ("Unless the [court] otherwise directs, the pretrial memorandum of each party shall contain . . . [a] list of every item of monetary damages claimed. . . ."). Rule 26 also requires that parties "supplement and correct" initial disclosures and responses to interrogatories "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1), (e)(2). Pursuant to Federal Rule of Civil Procedure 37, "[a] party that without substantial justification fails to disclose

information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). Rule 37 also empowers a court to impose other appropriate sanctions instead, including "payment of reasonable expenses, including attorney's fees, caused by the failure" to make the required disclosure. Id.

3. Discussion

In this case, Stein offers two reasons why he did not enumerate these categories of his alleged damages. First, Stein argues that he could not do so because discovery closed before the Defendants' lease expired. As a result, the Defendants did not vacate Stein's property until after the close of discovery. Stein believes that this fact made it impossible for him to properly complete discovery. For example, Stein argues that his loss of use, loss of income and lost opportunity damages could not be ascertained until after the Defendants vacated the property, giving Stein a chance to sell or rent the property. This argument is unpersuasive; if Stein had truly been impaired in his ability to conduct discovery, the proper course of action for him would have been to petition the Court for an order

compelling discovery or extending discovery beyond termination of the Defendants' lease.

Second, Stein argues that he did not have to enumerate his damages because he is seeking a declaratory judgment under the Declaratory Judgment Act, 22 U.S.C. § 2201-22022 (1994). In other words, Stein seeks a judicial declaration that the Defendants contaminated his property and that, accordingly, he is entitled to collect these types of damages. Based on that judgment, Stein would ostensibly return to the Court to collect the remainder of his damages once they accrue and become quantifiable.

Stein argues that he is entitled to a declaratory judgment because the damages to his property have yet to accrue and become quantifiable. The Court disagrees. The decision whether to entertain a suit for declaratory relief is in the sound discretion of the Court. Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995). The Court finds that, based on the facts of this case, it would not be appropriate to do so. Although Stein has yet to sell his property, he concedes that the contamination occurred at some point in 1996. Thus, the damage to his property already occurred, irrespective of whether he ever tries to sell it. Moreover, to allow Stein a second trial on his purportedly future damages could enable him to play the market, bringing suit when the real estate market softens, in an attempt to maximize

his damages. The Court similarly finds that, although his damages cannot be known with exacting precision, expert witnesses trained in the environmental and real estate fields would be able to quantify them, and indeed regularly perform such a function. Accordingly, the Court finds that this case is not an appropriate one for declaratory a declaratory judgment.

Although the Court disagrees with Stein's argument that he is entitled to a declaratory judgment, the Court finds that he held that belief in good faith, not merely in an attempt to avoid the preclusion of this evidence at trial. Importantly, Stein's counsel made this argument at Stein's deposition, well before the Defendants filed the instant Motion.[5] The Court retains discretion in crafting a remedy for violation of this Rule. Given Stein's good faith belief in his albeit erroneous argument, the Court will not preclude him from presenting this evidence at

[5] The Defendants apparently believe that this argument was disingenuous because Stein's Complaint only sought a declaratory judgment with regard to Stein's future costs, not the diminution in the value of his property. While that is a correct characterization of the Complaint, that fact would not necessarily have precluded Stein from seeking such relief from the Court in an appropriate case. Federal Rule of Civil Procedure 57 provides that "[t]he procedure for obtaining a declaratory judgment . . . shall be in accordance with these rules. . . ." Fed. R. Civ. P. 57. The fact that Stein's Complaint did not ask for a declaratory judgment with regards to all of his future damages is therefore not dispositive, as "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c).

trial. The Court will therefore allow him additional time to engage an expert witness that will enumerate these damages sufficiently. If Stein fails to do so, the Court will not hesitate to preclude him from presenting that evidence, and to impose other appropriate sanctions as well. The Court will also allow the Defendants additional time to counter that evidence, and allow both sides to depose their opponents' expert witnesses.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| CHARLES D. STEIN | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| FOAMEX INTERNATIONAL, INC., et al. | : | No. 00-2356 |

**O R D E R**

**AND NOW**, this 23rd day of July, 2001, in consideration of the Motion to Compel Plaintiff's Production of Documents (Doc. No. 38) filed by the Defendants, Foamex International, Inc., Foamex L.P., Foamex Carpet Cushion, Inc., Trace International Holdings, Inc., General Felt Industries, Inc., GFI-Foamex and Marshall S. Cogan (collectively referred to as the "Defendants"), the Response of the Plaintiff, Charles D. Stein ("Stein"), and the Reply thereto, the Defendants Motion to Preclude Plaintiff's Presentation of Evidence Related to Damage Categories Never Enumerated by Plaintiff (Doc. No. 30), Stein's Response and the Defendants' Reply thereto, as well as extensive oral argument and presentation of evidence on these Motions during a hearing held on July 18, 2001, it is **ORDERED** that:

1. The Defendants' Motion to Compel Plaintiff's Production of Documents is **GRANTED**.

   A. Plaintiff is **DIRECTED** to produce, within twenty (20) days of the date of this Order: (1) all documents requested by the Defendants in paragraph one of their

Motion to Compel; (2) all documents related to the matter between Ludwig's Village and ExxonMobile, on which Stein's expert admitted working; (3) the memorandum sought in paragraph 2 of the Defendants' Motion to Compel or, alternatively, produce affidavits from Stein's counsel and Stein's expert stating the measures taken to locate that memorandum and assuring the Defendants that it does not exist; and (4) an affidavit from Stein's expert stating conclusively whether Stein's expert has worked on other purportedly confidential cases that are similar to this matter and, if he has, produce all documents produced by that expert on any and all such cases. Failure to comply with this Order may subject Stein to sanctions, including dismissal of this suit.

B. Plaintiff is **DIRECTED** to pay the Defendants' reasonable expenses incurred in making this Motion, including their attorney's fees. The Defendants shall, no later than fourteen (14) days after this Order, file an affidavit of attorney's fees and expenses that were reasonably incurred in the prosecution of this Motion to Compel. Stein may respond to that affidavit no later than fourteen (14) days after it is filed.

2. The Defendants' Motion to Preclude Plaintiff's Presentation

of Evidence Related to Damage Categories Never Enumerated By Plaintiff is **DENIED** without prejudice.

A. No later than forty-five (45) days after the date of this Order, Stein shall serve the Defendants with an expert report, and all documents in support, that explicitly enumerates all of his damage categories. Failure to do so will result in the preclusion of his ability to present evidence concerning those damages at trial, as well as other possible sanctions permitted under the Federal Rules of Civil Procedure. No later than sixty (60) days after Stein produces his expert report, the Defendants shall file an answering expert report and shall conclude all factual discovery necessary to address issues newly raised by Stein's expert report. No later than thirty (30) days after the Defendants file their answering expert report, the parties shall discover each other's experts.

B. Stein shall file his pretrial memorandum on or before November 26, 2001. The Defendants shall file their pretrial memorandum on or before December 10, 2001.

This case will be placed in the trial pool on January 2, 2002, and a pretrial conference will be held on the day the case is called to trial.

BY THE COURT:

_____
JAMES McGIRR KELLY, J.